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No. 85-1668

In the Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL UNDERHILL, d/b/a EASTSIDE MOTORS, AND WARD MASSEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sole proprietor automobile dealers who are statutorily obligated to keep records of the odometer readings of the vehicles that they buy and sell, and to make those records available for inspection, may assert a Fifth Amendment privilege to refuse to produce those records in response to grand jury subpoenas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 781 F.2d 64. The opinions of the district court for the Western District of Kentucky (Pet. App. 15-25) and of the district court for the Eastern District of Kentucky (Pet. App. 26-31) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1986. A petition for rehearing was denied on February 27, 1986 (Pet. App. 13-14). The

petition for a writ of certiorari was filed on April 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Motor Vehicle Information and Cost Savings Act (the Act), 15 U.S.C. 1901 *et seq.*, Congress found that automobile purchasers rely on odometer readings in determining a vehicle's safety, condition, and value. 15 U.S.C. 1981. Congress accordingly prohibited tampering with or disconnecting odometers. 15 U.S.C. 1984. It directed the Secretary of Transportation (the Secretary) to prescribe rules mandating that any transferor of a motor vehicle give the transferee written disclosure of the mileage registered on the car's odometer, as well as a notice if the odometer reading is known to be inaccurate. 15 U.S.C. 1988. Similarly, Congress authorized the Secretary to require automobile dealers to maintain and permit inspection of records needed for enforcement of the Act. 15 U.S.C. 1990d(a), (b) and (c)(2). Pursuant to this statutory authority, the Secretary has promulgated regulations that, among other things, require car dealers to keep and make available for federal on-site inspection the odometer statements of vehicles that they bought and sold during the preceding four years. 49 C.F.R. 580.7. Congress also created (15 U.S.C. 1990, 1990b, 1990c) civil and criminal penalties for violations of the Act or its implementing regulations.

2. Petitioners Massey and Underhill are sole proprietors who operate used car dealerships that are subject to the statutory and regulatory requirements described above. In late 1984, a federal grand jury sitting in the Western District of Kentucky was in-

vestigating possible violations of the Act. It issued a subpoena to Underhill. He was called to testify and was directed to bring with him odometer statements for automobiles that he had bought and sold during a specified period. Pet. App. 2-3. Underhill responded by asking the district court to quash the subpoena, contending that the subpoena required him to make incriminating testimonial communications in violation of the Fifth Amendment (*id.* at 3).

In October 1984, Massey was subpoenaed by a federal grand jury sitting in the Eastern District of Kentucky. Massey was asked to appear and to bring with him, among other things, odometer statements for automobiles that he had bought and sold during a particular period. Pet. App. 3. Like Underhill, Massey moved the district court to quash his subpoena, arguing that the demand that he produce the odometer statements violated his Fifth Amendment privilege against self-incrimination (*ibid.*).

The district courts granted the respective motions to quash (Pet. App. 15-25, 26-31). Both courts initially held that the odometer records, being records that the government requires regulated parties to keep and make available for inspection, fell within the so-called "required records" exception to the Fifth Amendment. The district courts accordingly found that the *contents* of the records were not protected by the privilege against self-incrimination. Pet. App. 23-24, 27. Relying on *United States* v. *Doe*, 465 U.S. 605 (1984), however, both district courts concluded that "the act of production or nonproduction of said records constitutes a risk of testimonial self-incrimination which is both 'substantial and real' " (Pet. App. 30; see *id.* at 22-23). For this reason, the courts held that the grand jury de-

mands for production of the records "require[d] testimonial self-incrimination" (*id.* at 24; see *id.* at 30), and therefore were inconsistent with the Fifth Amendment.

3. In a consolidated appeal, the court of appeals unanimously reversed (Pet. App. 1-12). At the outset, the court of appeals agreed with the district courts that the odometer records themselves fall within the "required records" exception to the Fifth Amendment privilege. The court explained that the exception is applicable when three conditions are met: "First, the purposes of the government's inquiry must be essentially regulatory, rather than criminal. Second, the records must contain the type of information that the regulated party would ordinarily keep. Third, the records 'must have assumed "public aspects" which render them at least analogous to public documents.'" Pet. App. 4-5 (quoting *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968)).

The court of appeals found each of these conditions satisfied here. While it recognized that the subpoenas were issued in the course of a criminal investigation (Pet. App. 5), the court explained that the provisions governing the contents of the odometer records, and requiring that such records be kept for four years, are key components of the Motor Vehicle Information and Cost Savings Act and hence "serve the overall purpose of enforcement of an essentially regulatory program" (*id.* at 6). The court also had "no difficulty in concluding that the Act requires the maintenance of records which automobile dealers would ordinarily keep" (*id.* at 8). And it found that odometer records "assume 'public aspects' in that every transferor is required to provide a signed copy to the buyer, and every transferee is required to sign

the statement to acknowledge receipt" (*ibid.* (citations omitted)).

Having found that the odometer statements fall within the "required records" doctrine, the court of appeals went on to reverse the district court holdings that the act of producing the records is nonetheless protected by the Fifth Amendment. The court of appeals noted that this Court's decision in *Doe* involved the act of producing *voluntarily kept* sole proprietorship records; the Court expressly stated its " 'understand[ing] that th[e] case concern[ed] only business documents and records not required by law to be kept or disclosed to a public agency' " (Pet. App. 9-10 (quoting 465 U.S. at 607 n.3)). The court of appeals thus ruled that the holding of *Doe* was of no help to petitioners. The court of appeals further concluded (Pet. App. 10-11) that the rationale behind the required records exception—that an individual admits little of significance when he discloses records that have a "public aspect," and that an individual who conducts business in an area in which the government requires record-keeping may be deemed to have waived any Fifth Amendment protection against disclosure of those records—was no less valid after *Doe* than it was previously (*id.* at 11).

The court of appeals therefore rejected petitioners' argument that the Fifth Amendment privilege must be applicable here because the act of producing the odometer records might reveal incriminating information. This argument, the court explained, "overlooks the fundamental fact that the required records doctrine is an *exception* to the Fifth Amendment." Pet. App. 11 (emphasis in original). Indeed, the court found that "in order to have meaning, the required records exception must apply to the act of

production as well as [to] the contents of documents to which the doctrine applies" (*id.* at 12).

ARGUMENT

The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. There accordingly is no basis for further review.

1. Petitioners first assert (Pet. 7-8) that the odometer records at issue in this case do not fall within the category of "required records" whose disclosure is unprotected by the Fifth Amendment. Petitioners insist that the statutory provisions obligating them to retain odometer records are criminal rather than regulatory in nature, stating that they "fail to see any regulatory purpose" for requiring retention of the records "other than as evidence for use for either civil or criminal sanctions for odometer tampering" (*id.* at 7). They accordingly suggest that the records themselves are privileged. This argument, however, is grounded on a fundamental misunderstanding of the "required records" doctrine.

As the court of appeals explained, the relevant inquiry in a case of this sort is whether the record-keeping requirement at issue aids in the enforcement of a program that is essentially regulatory in nature. See *California* v. *Byers*, 402 U.S. 424, 430 (1971) (plurality opinion); *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968). The Act, which is designed to facilitate commerce by providing consumers with important information, plainly satisfies that criterion. See generally *United States* v. *Alkhafaji*, 754 F.2d 641, 648 (6th Cir. 1985); *United States* v. *Flores*, 753 F.2d 1499, 1501-1502 (9th Cir. 1985) (en banc) (citing cases). That petitioners' documents were

sought by a grand jury does not change the regulatory and non-investigative environment in which those documents were *created*, and thus does not make the "required records" exception inapplicable. See *Shapiro* v. *United States*, 335 U.S. 1 (1948). Cf. *United States* v. *Doe*, 465 U.S. 605, 610-612 (1984).

2. Petitioners also contend (Pet. 11-12) that the court of appeals' holding is inconsistent with *United States* v. *Doe*, *supra*. The Court there held, in part, that the act of producing records that had been voluntarily prepared by a sole proprietorship amounted to "testimonial self-incrimination," and hence that production of the documents could not be compelled (465 U.S. at 612-614). Petitioners assert that this "act of production" doctrine is applicable even when the documents requested are "required records"—that is, records which by law must be created and made available for inspection.

In the absence of a conflict in the circuits on the question presented—an absence conceded by petitioners (Pet. 22)—there is no need for the Court to revisit the implications of the act-of-production doctrine as recently set forth in *Doe*. But petitioners' contention is, in any event, without merit. The proposition that the act of producing records may itself provide incriminating information was first articulated not in *Doe*, but rather in *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). See *Doe*, 465 U.S. at 613. In the years since the *Fisher* decision, each court of appeals that has considered the question has held, as the court below did, that the act of producing documents does not implicate the Fifth Amendment when the documents requested are "required records."

These courts have reasoned correctly that "[t]he governmental requirement that [records] be kept im-

plies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production." *In re Grand Jury Subpoenas Duces Tecum*, 722 F.2d 981, 987 n.5 (2d Cir. 1983). Thus, "[i]n this respect, the mere response [to a subpoena] by production is no more a violation of the privilege against self-incrimination than requiring the creation of the record itself, for it is the record, presumably, that might incriminate." *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979). Accord, *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 n.15 (3d Cir. 1982), aff'd in part and rev'd in part on other grounds, 465 U.S. 605 (1984). Obviously, it would not do the government much good to require that records be kept unless the government also could require that the records be produced for it to see. This Court's decision in *Doe*, which specifically stated the Court's understanding that its holding did not extend to required records (see 465 U.S. at 607 n.3), is entirely consistent with this analysis.[1]

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[1] Petitioners insist (Pet. 9-10) that they have not knowingly and intelligently waived their Fifth Amendment privilege. The courts, however, never have looked for a formal waiver of rights in the "required records" context: "The[] obligations to keep and produce the records are in a narrow sense consented to as a condition of being able to carry on the regulated activity involved." *McCoy*, 601 F.2d at 171. Cf. *Donovan* v. *Dewey*, 452 U.S. 594 (1981). The premise of the "required records" doctrine is that regulated parties are *deemed* to have waived objection to production of the documents at issue; if a formal waiver had to be demonstrated on the facts of each particular case, the "required records" doctrine would be meaningless.

The courts of appeals are thus unanimous in their agreement that the act-of-production doctrine is inapplicable here. Congress made the creation of odometer records—and the production of those records for inspection by the Secretary—a condition of doing business as a used car dealer. Cf. *Donovan* v. *Dewey*, 452 U.S. 594 (1981). Indeed, Congress specifically authorized the Secretary to provide the information obtained through such inspections to the Attorney General "for investigative consideration." 15 U.S.C. 1990d(a)(1). Persons who operate used car dealerships are presumptively aware of these requirements, and accordingly must conduct their operations with these provisions in mind. The fact that compliance with these provisions may reveal information that could be useful in a prosecution does not change this conclusion. To the contrary, as the court of appeals emphasized, the "required records" doctrine is an exception to the Fifth Amendment, and "[a]s such, the doctrine presupposes that compliance with the government's inquiry may be incriminating" (Pet. App. 11).[2]

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[2] In analogous circumstances, this Court explained that, while "[i]nformation revealed by [required] reports could well be a 'link in the chain' of evidence leading to prosecution and conviction, * * * the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Byers*, 402 U.S. at 428 (plurality opinion).

CONCLUSION

The petition for a writ of certiarari should be denied.

Respectfully submitted.

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